IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 17 OF 1998.

1. Satyavati Dharma Porob,
   (since deceased represented
   by her legal heirs):-
1a. Smt. Shali Vamon Fadte,
   r/at Gogal, Margao.
1b. Smt. Sashi Nanda Tari
   and husband
1c. Shri Nanda Yeshwant Tari,
   both r/at Rundor, Usgao.
1d. Smt. Pushpa Sada Sawant
   and husband
1e. Shri Sada Babuso Sawant,
   both r/at Muddi Mallov,
   Piedade, Goa.
1f. Smt. Chanda Ranganath Sawant
   and husband
1g. Shri Ranganath Purshottam
   Sawant, both r/at Coliwadda,
   Cumarjua, Ilhas Goa.
2. Shri Sonu alias Madhu Dharma
   Porob, r/o Marjua, Piedade,
   Ilhas Goa.
3. Shri Ladu alias Mohan Dharma
   Porob, r/o Marjua, Piedade,
   Ilhas Goa.
4. Maduram Dattaram Priolkar,
   r/o Marjua, Piedade, Ilhas
   Goa. ... Appellants.

Versus

1. Rajaram Pandu Fadte, r/o
   Marjua, Piedade, Ilhas Goa.
2. Smt. Saraswati Rajaram
   Fadte, r/o Marjua, Piedade,
   Ilhas Goa. ... Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Mr. A.D. Bhobe, Advocate for the Appellants.

Mr. A. Kansar, Advocate for the Respondents.

Coram : P.V. HARDAS, J.

Date : 17th March 2004.

ORAL JUDGMENT.

This Second Appeal has been filed at the

instance of original defendants, being aggrieved by the Judgment and Decree passed by the Additional District Judge, Panaji, dated 7th April 1998, in Regular Civil Appeal No. 11 of 1997, dismissing the appeal filed by the present appellants and maintaining the Judgment and Decree passed by the Civil Judge, Junior Division, Panaji, dated 9th July 1996, in Regular Civil Suit No. 242/87/B, partly decreeing the suit with costs.

2. This Second Appeal was admitted by this Court on 9th October 1998, on the following substantial questions of law:-

> "(a) Whether the Additional District Judge has acted without jurisdiction, for formulating the question as to whether the appellants prove that the respondents were staying in the house as mere licencees and that the licence was revoked and they were liable to be evicted from the house, when in the memorandum of appeal, as well as in the written arguments filed before the Additional District Judge, the appellants categorically confined their challenge, merely to that part of the Decree of the learned trial Judge insofar as it rejected the counter-claim of the appellants for demolition of the encroachment on the northern side of the suit house?
>
> (b) Whether the findings rendered by the Additional District Judge on the aspect of encroachment, are vitiated on account of the fact that the Additional District Judge failed to distinguish between encroachment on the eastern side and encroachment on the northern side and confused himself to hold that what was deposed to by witnesses in respect of the encroachment on the

eastern side, as being their deposition in respect of the northern side?"

3. The facts, in brief, as are necessary for the decision of this appeal are stated hereunder:-

The respondents/original plaintiffs filed a suit for possession and permanent injunction, which was registered as Regular Civil Suit No. 242/87/B, in the Court of the Civil Judge, Junior Division, Panaji. In the suit it was alleged that there is a property known as 'Marjua' and the same is surveyed under Survey No. 52, Sub-Division 10 and stands in the name of late Dharma Savlo Porob. The late Dharma Porob died leaving behind his widow and 7 children, that is, 5 daughters and 2 sons. The defendant no. 1 is the widow and defendants 2 and 3 are the sons of late Dharma Porob. The plaintiff no. 2 is the eldest daughter and the plaintiff no. 1 is the husband of the plaintiff no. 2. The defendant no. 4 was described as a labourer residing with the other defendants.

In the plaint it was further averred that late Dharma Porob had his house in the said property wherein the defendants reside. The said house is situated in front of the house of the plaintiffs and late Dharma Porob had allowed the plaintiff no. 1 to construct his house in the said property close to his house. It was alleged that the plaintiffs are the owners in possession

and occupation of the said house and a hut constructed by them since last about 35 years. It was alleged that there is a well situated in the said property and the same is being used by the parties. It was stated in the plaint that the survey records and survey plan pertaining to the house show a hut which is an integral part of the house and which has been used by the plaintiffs for the purpose of stocking firewood and other materials.

It was further alleged that suddenly, on 6th December 1987, the defendants 2, 3 and 4, forcibly and in a high-handed manner, entered the hut of the plaintiffs and threw away the articles belonging to the plaintiffs and dismantled the wooden stand used for tying the cattle. The plaint further discloses that the defendants threatened the plaintiffs with dire consequences. The plaint further alleges that, on 13th December 1987, defendants 2, 3 and 4 put a fencing around the hut, restraining the plaintiffs from entering the said hut. The plaintiffs, therefore, allege that they had been dispossessed by the defendants illegally and in a high-handed manner. The plaintiffs, therefore, pray for a decree delivering to the plaintiffs the possession of the hut and also directing that the defendants, their agents, etc., be restrained permanently from demolishing or in any manner

interfering with the peaceful possession and occupation of the house and the hut. The plaintiffs further pray for demolition of the said fencing put by the defendants.

4. The defendants filed their written statement, at Exhibit 5. It was contended by the defendants that it was false that the plaintiffs' house is situated in the property surveyed under Survey No. 52/10. It was stated that the house in which the plaintiffs were residing belonged to late Pandurang Savlo Porob. The defendants also deny that the suit house was constructed by the plaintiffs. It was also denied that late Dharma Porob ever allowed the plaintiff no. 1 to construct any house or hut in the said property. In paragraph 3 of the written statement, it was contended that until May 1987, there was a space of 3 metres between the house occupied by the defendants and the house occupied by the plaintiffs. In the month of May 1987, the plaintiffs carried out illegal extension to the house on the northern and eastern sides thereby encroaching in the space between the two houses. It was also stated that this extension was carried out without permission from the Village Panchayat and without permission from the defendants. It is also stated that the Block Development Officer, by his Order, dated 6th June 1987, had directed the plaintiff no. 1 to demolish the

illegal construction carried out by him. It was also stated that the plaintiffs have covered the laterite pillars with palm leaves and are claiming that the said structure forms a part of their dwelling house. The defendants denied that there was any hut in front of the plaintiffs' house, which was used either for storing firewood or other material. The defendants, in their counter-claim, claimed that the plaintiffs had illegally encroached on a part of their property by extending the house in their occupation on the eastern and northern sides. The encroachment on the eastern side is to the extent of 1 metre from the old eastern wall of the house occupied by the plaintiffs and on the northern side the encroachment was to the extent of six metres. The defendants, therefore, pray, in the counter-claim, for a decree directing the plaintiffs to demolish the illegal encroachment on the eastern and the northern sides and also for a decree directing the defendants to deliver vacant and peaceful possession of the suit house to the plaintiff no. 1.

5. During the course of arguments, Mr. Lotlikar, the learned senior counsel appearing on behalf of the appellants, has stated that the appellants are not pressing the relief of decree for delivery of vacant possession of the suit house. It was also stated that the relief in respect of demolition of the illegal

construction is restricted only in respect of the encroachment on the northern side and the appellants are not pressing for the relief of demolition of encroachment on the eastern side.

6. The learned trial Court by its Judgment, in respect of the encroachment, in paragraph 27, has held that the pleadings of the defendants did not indicate that the plaintiffs had constructed any pakadi admeasuring 3 x 2 metres in front of their house. In paragraph 28 of the Judgment, the learned trial Court did not attach any credibility to the evidence of D.W.1 Ladu Parab, D.W.2 Raghoba K. Velingkar and D.W.3 Keshav Shet as there were no pleadings to this effect. In paragraph 29 of the Judgment, the learned trial Court came to the conclusion that the pleadings of the defendants indicate that the plaintiffs had not demolished the laterite pillars but had covered the said pillars with palm leaves, whereas, the evidence of D.W.1 Ladu was to the effect that the plaintiffs had demolished the laterite pillars and had fixed wooden poles and had covered the same with palm leaves. Thus, the learned trial Court found that the evidence adduced by the defendants was contrary to the pleadings and the same could not be believed.

7. The learned appellate Court also came to the

conclusion, at paragraph 11 of the Judgment, that the pleadings of the defendants and the evidence was at variance and, therefore, dismissed the appeal filed by the appellants/defendants, maintaining the Judgment and Decree passed by the learned trial Court.

8. On the basis of the pleadings of the parties, the learned trial Court had framed the following issues:-

> "1. Whether the plaintiffs prove that they had constructed a house and the hut situated in the property under survey no. 52/10?
>
> 2. Whether the plaintiffs prove that the defendants have taken forcible possession of the hut by putting barbed wire fencing around the hut?
>
> 3. Whether the plaintiffs prove that the defendants have obstructed them from fetching water from the common well?
>
> 4. Whether the defendants prove that the plaintiffs are occupying the suit house as licencee of the defendant no. 12?
>
> 5. Whether the defendants prove that the licence is revoked and that the plaintiffs are liable to vacate the suit house?
>
> 6. Whether the defendants prove that the plaintiffs have extended their house?"

In the present appeal, this Court is concerned with the findings recorded by the Courts below in respect of issue no. 6, that is, whether the defendants

prove that the plaintiffs have extended their house?

9. Mr. Lotlikar, the learned senior counsel appearing on behalf of the appellants, has urged that the two Courts below were wholly in error in coming to the conclusion that there were no pleadings of the defendants in respect of the encroachment. According to the learned counsel for the appellants, the defendants have pleaded about the encroachment and as such the two Courts below were in error in not decreeing the counter-claim in respect of the encroachment on the northern side.

10. Mr. Kansar, the learned counsel appearing on behalf of the respondents/plaintiffs, has contended that there are no pleadings in respect of the encroachment and that the laterite pillars had been demolished and in its place wooden pillars had been erected and, thus, the decree for demolition of the encroachment cannot be granted.

11. In the written statement, at paragraph 3, the defendants have pleaded their case thus:-

> "3. The contents of para. 4 of the plaint are denied. It is denied that any hut which the plaintiffs claim to be integral part of their house is shown in the survey records. The defendants state that until May, 1987 there was a space of 3 metres in

> between the house occupied by the defendants and the one occupied by the plaintiffs. In the month of May, 1987, the plaintiffs carried out an illegal extension to the said house on its northern and eastern side thereby encroaching on the space in between the 2 houses as also on the property of the defendants on the eastern side. This extension was carried out without permission from the Village Panchayat and also without permission from the defendant and therefore the defendant no. 1 lodged a complaint to the Sarpanch of the Village Panchayat and the Block Development Officer as a consequence of which by order dated 6-6-87 the plaintiff no. 1 was directed to demolish the illegal construction carried out by him. These defendants state that in his reply dated 19-5-87 sent to the Panchayat in reply to the show cause notice issued, the plaintiff no. 1 clearly admitted that he had attempted illegal construction of the house, that there was a passage of 3 metres between the 2 houses and that he had constructed 3 pillars adjoining the main entrance of his house. The defendants state that although he was directed by the Village Panchayat to demolish the construction, the plaintiffs have on the contrary covered the said laterite pillars with palm leaves and are now claiming that the said structure forms a part of their dwelling house."

In the counter-claim at paragraph 13 the defendants have pleaded thus:-

> "13. The defendants state that the plaintiffs have illegally encroached on a part of their property by extending the house in their occupation on the eastern and northern sides. On the eastern side the extent of encroachment is of one metre from the old eastern wall of the house occupied by the plaintiffs. On the northern side the encroachment is to the extent of 6 square metres. The said encroachment has been done without obtaining prior

> permission of the defendants or the local Village Panchayat and as such the plaintiffs are liable to demolish the said illegal encroachment."

12. The learned trial Court in paragraph 21 has observed that the plaintiffs have also not produced any documentary evidence to prove the existence of the hut. In paragraph 23 of the Judgment the learned trial Court has concluded that the plaintiffs had failed to establish that they had constructed a hut and that the defendants had taken forcible possession of their hut. The learned trial Court, therefore, by permanent injunction restrained the defendants from demolishing or interfering with the suit house and further restrained the defendants from preventing and/or obstructing the plaintiffs from fetching water from the well. The learned trial Court also directed the defendants to remove the barbed wire fencing put across the access to the well.

13. P.W.1 Rajaram Fadte in his evidence had denied the suggestion that he had extended his house on the northern and eastern sides without the permission of the defendants and without taking permission of the Panchayat. He, however, admitted as true that the Panchayat had issued him a demolition notice, dated 6th June 1987. He has also stated that earlier he had received a show cause notice. He has admitted as true that he had given a reply admitting that he had erected

three pillars in between the house and he agreed to demolish the same. He has further admitted that he demolished the pillars. He states that in his reply to the show cause notice he has admitted that there was a 3 metres passage in between the two houses. He states that presently the passage of 3 metres is not existing as about one and a half metres is covered by the pakadi in front of his house. He has admitted that the pakadi was not removed and presently the pakadi is resting on wooden poles. He has also admitted that due to pakadi the width of the passage is reduced from 3 metres to 1.5 metres.

14. D.W.1 Ladu Parab has stated that in pursuance to the notice from the Panchayat, the plaintiffs demolished the pillars of the pakadi which was constructed admeasuring 3 x 2 metres. The said pakadi was constructed in front of the house. It was further stated that the plaintiffs demolished the said pillars and raised wooden pillars covering the same with leaves. There is no effective cross-examination to this aspect of the defendants evidence. The defendants witness D.W.2 Raghoba and D.W.3 Keshav have also deposed about the construction of the pakadi in front of the house of the plaintiffs, that is, on the northern side. Admittedly as per the evidence of plaintiff no.1 himself the said structure is an illegal structure erected by

him without obtaining prior permission. According to him, the pillars were demolished and in its place wooden pillars were erected. However, the existence of the structure as such is not denied by the plaintiffs and thus, the defendants have proved that the plaintiffs had erected an illegal structure, that is, pakadi on the northern side. The defendants have pleaded that the structure admeasures 3 x 2 metres. The central question for my consideration is whether there are pleadings to this effect. A perusal of paragraph 3 of the written statement and paragraph 13 of the counter-claim reveal that the defendants have stated that on the northern side the plaintiffs have encroached to the extent of 6 square metres. In substance, therefore, there is pleading regarding the construction of an illegal structure encroaching on the passage on the northern side to the extent of 6 square metres. Merely because the defendants have not pleaded that the laterite pillars had not been demolished and in its place wooden pillars were erected, according to me, is not a case where there are no pleadings at all. This is not a case where there is a total absence of plea. The defendants case is for demolition of the illegal structure on the northern side admeasuring 3 x 2 metres. This case of the defendant is to be found in the pleadings as well as in the evidence. Slight discrepancy in the evidence or deficient pleadings cannot be equated to 'no pleadings'.

In the present case also I do not find any variance between the pleadings and proof. Both the Courts below, therefore, according to me, were in error in coming to the conclusion that the defendants had not pleaded about the encroachment admeasuring 3 x 2 metres on the northern side. Since the learned counsel for the appellants has restricted the counter-claim of the defendants only to the encroachment on the northern side, I have examined the pleadings and the proof only relating to the encroachment on the northern side. Thus, according to me, the plaintiffs had sufficiently pleaded about the encroachment on the northern side and had led adequate evidence in that regard. The two Courts below have not accepted the evidence as there was no pleading to that effect, which finding, according to me, is wholly perverse.

15. In the result the Judgments and Decrees of the two Courts below in respect of the dismissal of the counter-claim of the defendants in respect of the demolition of the structure encroaching on the northern side only is set aside and as a result the counter-claim of the defendants in respect of the prayer for demolition of the encroachment admeasuring 6 square metres on the northern side only is decreed. Rest of the prayers in the counter-claim are not granted. Decree be drawn accordingly. In the circumstances,

there shall be no order as to costs.

(P.V. HARDAS)
JUDGE.

ed's.